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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 238

THOMAS E. PROCTOR, 2nd, JOHN RIKER PROCTOR, ESTHER B. PROCTOR, MARY P. CASE, EMMA M. RICE, GERALDINE M. CRAIG, NEIL W. RICE, HILDA R. AYER, THOMAS E. P. RICE; AND THOMAS M. REYNOLDS, DAVID BROUDE and BOSTON SAFE DEPOSIT AND TRUST COMPANY, Trustees Under The Last Will and Testament of THOMAS E. PROCTOR, Deceased, Petitioners,

v.

THE SAGAMORE BIG GAME CLUB, THE SYLVANIA CORPORATION, UNITED NATURAL GAS COMPANY, NATIONAL FUEL GAS COMPANY, FRANK G. ALTMAN, H. P. BOARTS, F. E. CARROLL, W. L. CARROLL, A. J. EISENHUTH, H. U. FLICKINGER, JOHN W. FLICKINGER, BERTHA E. JONES SHEARER, JOHN RUMMEL, A. C. THOMAS, WILLIAM WALKER, D. D. FLICKINGER, ANTONIA JOHNSON, CLYDE K. MOORE, GEORGE C. SCHRECONGOST, R. L. SEGER, L. E. THOMAS and E. C. WAREHAM

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Thomas E. Proctor, 2nd, John Riker Proctor, Esther B. Proctor, Mary P. Case, Emma M. Rice, Geraldine M. Craig, Neil W. Rice, Hilda R. Ayer, Thomas E. P. Rice; and Thomas M. Reynolds, David Broude, and Boston Safe Deposit and Trust Company, Trustees Under The Last Will and Testament of Thomas E. Proctor, Deceased, pray that a Writ of Certiorari issue to review the judgment of the Court of Ap-

peals for the Third Circuit entered in the above cause March 24, 1959, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported in 265 F. (2d) 196, which is reproduced in the Appendix hereto, infra.

The Opinion of the District Court is reported in 166 F. Supp. 465, which is reproduced at (124a).

JURISDICTION

The Order of the Court of Appeals was entered on March 24, 1959. Plaintiffs' Petition for Rehearing was denied on April 27, 1959. The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Have Petitioners' Constitutional rights to trial by jury been violated and the powers of the District Court and Circuit Court of Appeals been exceeded under Rule 56 where the District Court held that there was no payment of the taxes and no redemption of the land after the tax sales as a matter of law even though Petitioners offered evidence which, if believed by a jury would sustain a contrary holding?

2. Have the District Court and Circuit Court of Appeals wrongfully interpreted the decisional law of Pennsylvania in holding that at the time of the sale of the land in controversy by Proctor on October 1, 1894 to Elk Tanning Company, Proctor had no title to convey

so as to except and reserve his right to the gas even though this sale was made during the redemption period permitted under the Tax Sale Acts?

3. Have the District Court and Circuit Court of Appeals wrongfully interpreted the decisional law of Pennsylvania when they hold that the parties to a deed as well as those in privity are not bound by the recognition of title in another contained in the deed?

4. Has the District Court wrongfully interpreted the decisional law of Pennsylvania in holding that notes and memoranda of the Prothonotary were in fact the minutes of the Court?

5. Have Petitioners' Constitutional rights to due process of law been violated where the Court of Appeals affirmed the District Court's decision in favor of Respondents, but for a different reason, namely the reason that the Curative Act of Pennsylvania of May 5, 1941, P. L. 38, Section 1, validated the tax sales even though such act gave Petitioners no right to redeem their lands after such tax sales were thus validated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States:

> "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

Amendment VII to the Constitution of the United States:

> "In suits at common law, where value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Article I Section 9: Pennsylvania Constitution:

"... nor can he be deprived of his ... property, unless by the judgment of his peers or the law of the land."

Pennsylvania Statute Act of May 5, 1941 P. L. 38:

"Whenever heretofore any land has been sold by the county treasurer of any county for the purpose of securing the payment of delinquent taxes which were assessed and levied against such land, and the county treasurer in pursuance of such sale executed a deed for said lands, and the acknowledgment of such deed by the county treasurer was defective in any respect, or where the records of the court failed to show a minute of such acknowledgment in open court, such sale and such deed shall not be invalidated by reason of such defective acknowledgment, if, in all other respects, the laws relating to the holding of such sale were fully complied with and the deed was, in fact, acknowledged before a judge of said county; and all such treasurers' sales and treasurers' deeds are hereby ratified, confirmed and validated; and the title to any such land purchased by any persons or by the county commissioners of any county at such treasurers' sale and the deed executed and acknowledged to such purchaser is hereby declared to be as valid as if such deed had been acknowledged in open court, proper minute thereof made, and return of said tax sale duly made in full conformity with the law relating thereto.

Section 2. This act shall become effective immediately upon final enactment."

Pennsylvania Statute Act of April 3, 1804, P. L. 517, 4 Sm. L. 201, §2:

"... the same in open court of common pleas of the proper county duly to acknowledge. ..."

Pennsylvania Statute Act of March 13, 1815, P. L. 177, 6 Sm. L. 299, §3:

"... after the deeds are acknowledged in the court of common pleas of the proper county, by the treasurer. ..."

§4

"If the owner ... shall make ... within two years after such sale, an offer or legal tender of the amount of the taxes for which the said lands were sold, and the costs, together with the additional sum of twenty-five per cent on the same ... said owner ... shall be entitled to recover the same by due course of law. ..."

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 56. Summary Judgment of Federal Rules of Civil Procedure:

(c) "... The Judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ..."

STATEMENT

The petitioners are Thomas E. Proctor, 2nd, John Riker Proctor, Esther B. Proctor, Mary P. Case, Emma M. Rice, Geraldine M. Craig, Neil W. Rice, Hilda R. Ayer, Thomas E. P. Rice; and Thomas M. Reynolds, David Broude and Boston Safe Deposit and Trust Company, Trustees Under The Last Will and Testament of Thomas E. Proctor, Deceased, citizens of the State of Massachusetts, New Hampshire, New York and Dominion of Canada. They instituted this action in the United States District Court for the Western District of Pennsylvania against The Sagamore Big Game Club, The Sylvania Corporation, United Natural Gas Company, National Fuel Gas Company, Frank G. Altman, H. P. Boarts, F. E. Carroll, W. L. Carroll, A. J. Eisenhuth, H. U. Flickinger, John W. Flickinger, Bertha E. Jones Shearer, John Rummel, A. C. Thomas, William Walker, D. D. Flickinger, Antonia Johnson, Clyde K. Moore, George C. Schreckongost, R. L. Seger, L. E. Thomas and E. C. Wareham, citizens of the Western District of Pennsylvania, New Jersey, Indiana, New Mexico, North Carolina and Connecticut. The subject matter of the civil action involves gas rights in a tract of land situate in Benezette Township, Elk County, District of the Western District of Pennsylvania. Jurisdiction of the Court was based upon diversity of citizenship of parties, with the amount in controversy exceeding the jurisdictional amount and upon the land being situate in the Western District of Pennsylvania. The petitioners sought to recover damages for the wrongful taking of the natural gas from the tract of land. The case was decided in favor of respondent-defendants by his Honor, Judge Willson, in the Western

District of Pennsylvania, who directed that judgment be entered on respondent's motion for Summary Judgment in favor of defendants. The Court of Appeals for the Third Circuit, Judges Goodrich and Staley, Circuit Judges, and Steele, District Judge, affirmed the District Judge's decision on March 24, 1959, and denied the petitioner's petition for rehearing on April 27, 1959.

Thomas E. Proctor, Sr., ancestor of petitioners, on June 5, 1893, acquired by deed from William E. Bigler, et ux et al. the tract of unseated land in controversy (161a). The land was encumbered with unpaid taxes for the years 1892 and 1893. Proctor, Sr. made an agreement with the Elk Tanning Company to convey, inter alia, the land in controversy, excepting and reserving the minerals, gas and oil. Proctor, Sr. was to make the conveyance free and clear of debts through the year 1892.

Proctor Sr. executed and delivered his deed to Elk Tanning Company dated October 1, 1894, covering the land in controversy, as well as other lands, excepting and reserving, inter alia, the natural gas from said lands (163a). Elk Tanning Company paid the unpaid 1893 taxes on the properties in controversy on December 30, 1893 prior to the date of the deed of purchase from Proctor, Sr., and prior to the tax sale for the unpaid 1892 taxes, which sale occurred on June 11, 1894 (56a).

G. W. Childs appeared as purchaser on the Treasurer's records of the land in controversy at the tax sale of June 11, 1894, (56a) making payment in the amount of $113.70 for land which Proctor, Sr. had paid $7500.00 one year before. G. W. Childs was then president of

Elk Tanning Company and was acting on their behalf in the matter.

In connection with the 1894 tax sale, plaintiff properly filed in the District Court the affidavit of John G. Flemming presenting certain statements of Elk Tanning Company bearing upon the settlement of accounts between Elk Tanning Company and the Estate of Proctor, Sr., (Proctor, Sr. having died December 12, 1894) relating to the purchase from Proctor, Sr. of certain other lands not in controversy but contained in the deed of October 1, 1894 (92a-104a). These facts together with the deed of 1903 from Elk Tanning Company to Central Pennsylvania Lumber Company are sufficient to support a finding by a jury that Elk Tanning Company had undertaken to make Proctor's title perfect as of 1893, and that it had in fact done so as indicated by its act in 1903 in conveying the property subject to the exceptions and reservations contained in the Proctor deed (105a-108a). G. W. Childs then assigned on June 28, 1898 the treasurer's deed to Elk Tanning Company prior to their conveyance to Central Pennsylvania Lumber Company (61a).

The Central Pennsylvania Lumber Company did not pay taxes upon the land in controversy for the years 1912 and 1913 prior to the time of the alleged tax sale in 1914. Pennsylvania Lumber Company's real estate agent, McCauley, appears as purchaser of the land at the alleged tax sale in 1914.

The petitioners also contend that the deeds of the Treasurers of Elk County following the alleged tax sales of 1894 and 1914 were void for the reason that they were not acknowledged in Open Court of Common Pleas of

Elk County, Pennsylvania, as required by the statute under which the alleged sales were made. The Treasurer's record set forth that the said acknowledgement took place on July 3, 1894 and July 6, 1914 respectively. The minute book of the Court of Common Pleas of Elk County on the dates mentioned contains no reference whatsoever of the Treasurer being in the Court for any purpose or that any Treasurer's Deeds were acknowledged (90a). Petitioners contend that such minutes are conclusive under the law of Pennsylvania and may not be contradicted. The District Court held that certain memoranda or notes of the prothonotary were the minutes of the Court. The Circuit Court of Appeals introduced into the case a Curative Act of the Pennsylvania Legislature, the Act of May 5, 1941, P. L. 38 Sec. 1, 21 P. S. 283. This Act purported to make valid prior acknowledgments of Treasurer's deeds "where the records of this court failed to show a minute of such acknowledgment in open court." Petitioners contend that this Act violated both the Federal Constitution and the Constitution of Pennsylvania in that it failed to provide an opportunity for redemption of the land from the tax sale, a right vested in the owners of this land under the laws of Pennsylvania.

The petitioners contend that one claiming under a deed is bound by the reservations and recognition of title in another contained therein. The instruments of conveyance under which defendants claim their title contain no conveyance of the gas and in fact recognize the title to such to be in Proctor, Sr. and his successors. This recognition in said deeds of the title of Proctor, Sr. to the gas, the petitioners feel, in and of itself, should make it improper for a Court to render summary judg-

ment under Rule 56 and certainly in conjunction with the other facts set forth herein above presents a factual issue for determination by a jury.

REASONS FOR GRANTING THE WRIT

Admittedly plaintiffs showed a prima facie title to the gas in controversy. The defendants made claim of title under one or both of two tax sales occurring in 1894 and 1914 respectively. The plaintiffs made three answers to defendants' claim of title:

First: Factual questions exist in reference to the tax sales of 1894 and 1914 as to whether there was payment of the taxes or the land redeemed from the tax sales and as to what the parties intended as shown by their subsequent deeds and acts. These factual issues were decided by the District Court and the Circuit Court of Appeals. In deciding these issues the Circuit Court and the District Court exceeded their powers under Rule 56 of the Federal Rules of Civil Procedure and violated Amendment VII of the Constitution of the United States.

The case of *Hunt v. Bradshaw*, 251 F. 2d 103, at page 108, holds that:

> ". . . when there is a debatable issue of fact in the trial of a suit at common law in a court of the United States, the right to have it determined by a jury is guaranteed by the Seventh Amendment of the Constitution."

The case of *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016, at page 1018, holds that under Civil Procedure Rule 56 ". . . a substantial dispute as to a material fact forecloses summary judgment."

Under the facts presented a jury could find:

(a) that the tax for 1892 involved in the 1894 tax sale had been paid or the tax sale redeemed in accordance with an agreement between the parties.

To support such findings, plaintiffs submitted proof as follows:

That Thomas E. Proctor, Sr. sold to Elk Training Company certain tracts of land, among which was the tract in controversy, excepting and reserving, inter alia, the natural gas and other minerals, and did execute, together with his wife, a deed of conveyance to said Elk Tanning Company dated October 1st, 1894, which was accepted by Elk Tanning Company (163a); that the record in the Treasurer's office named G. W. Childs as the purchaser of the land in controversy for 1892 taxes (56a); that Elk Tanning Company, by its President, said G. W. Childs, wrote to the Trustees of the Thomas E. Proctor Estate on May 7, 1897 enclosing certain statements of account between Elk Tanning Company and Thomas E. Proctor Estate, including taxes for 1892 and other years against certain other lands not in controversy but conveyed in the same Proctor deed of October 1, 1894, and in connection therewith noted that "The first three items above, being the 1892 Taxes, paid by E. T. Co., at tax sale 1894 for account of Proctor, to make his title perfect as of 1893." (94a, 102a); that G. W. Childs et ux. assigned to Elk Tanning Company on June 28, 1898 the Treasurer's tax deed for the tract in controversy (61a); that Elk Tanning Company conveyed by its deed to Central Pennsylvania Lumber Company, dated May 25, 1903, inter alia, the land in controversy subject to all exceptions and reservations contained in the deed from Thomas E. Proctor and wife to

Elk Tanning Company dated October 1st, 1894 (105a, 108a). This deed was signed by Childs as president and acknowledged by him as attorney-in-fact for his Company.

In connection with the deed of Proctor to Elk Tanning Company of October 1, 1894, it becomes necessary to discuss the position of the trial court and the Circuit Court. The trial court and the Circuit Court held that Proctor had no title to sell as of October 1, 1894 for the reason that at the time of the tax sale as of June 11, 1894 the title to the $7500.00 land became vested in G. W. Childs, the President of Elk Tanning Company, on Child's payment of $113.70. The redemption period was two years under the Tax Sales Act involved. October 1 was well within this period of permissible redemption. The petitioners rely upon *Shalemiller v. McCarty*, 55 Pa. 186 and *Dubois v. Hepburn*, 35 U. S. 1, 9 L. Ed. 325, to show that the owner is not divested of his title until after the two years has elapsed. To hold otherwise, as stated in *Shalemiller v. McCarty*, the purchaser at tax sale on payment of a few dollars could strip the land within the redemption period and leave nothing worth redeeming. The law of Pennsylvania, as contended by petitioners, was recognized by the Pennsylvania Legislature when it passed the Act of June 13, 1883, P. L. 89, Sec. 1 (12 P. S. 1463) permitting the purchaser of lands at tax sale to obtain a writ of estrepment to prevent waste on the land during the redemption period.

Petitioners contend that the facts which they have shown are facts from which a jury could find that the tax sale purchaser (Elk Tanning Company by their President, G. W. Childs) was obliged to pay the very taxes for which the tax sale was made, and in fact did

so, citing the case of *Coxe v. Gibson,* 27 Pa. 160, through G. W. Childs. Petitioners also contend that the facts which they have shown are facts from which a jury could find that there was an actual redemption of the land after the tax sale by the acts of the party purchasing the land at the sale (Elk Tanning Company) and the owner Proctor. It is possible under the law for redemption between the parties to occur even after the two year redemption period so as to invalidate an otherwise valid tax sale. See *Coxe v. Wolcott,* 27 Pa. 154 and *Steiner v. Coxe,* 4 Pa. 13.

(b) as to the 1914 tax sale for 1912 and 1913 taxes, the alleged tax sale purchase amounted to a mere payment of taxes. The Circuit Court did not touch upon this problem, but the District Court held that the facts did not show payment or redemption.

It was the duty, even though not personal obligation, of Central Pennsylvania Lumber Company, as owner of the land in controversy, to pay the taxes thereon; this it did not do for the years 1912 and 1913; when the treasurer, in 1914 placed the land for sale, the Central Pennsylvania Lumber Company had its real estate agent, C. H. McCauley, Jr., pay to the Treasurer, with the money of Central Pennsylvania Lumber Company, $186.27, the amount of the taxes, costs and interest, and had a Treasurer's deed made to him even though it was not recorded until October 9, 1957 after the institution of this action; that McCauley, Jr., by writing dated November 2, 1914, declared the above facts and agreed that he would upon request assign the tax deed as directed by said Central Pennsylvania Lumber Company; that Central Pennsylvania Lumber Company by written agreement dated July 30, 1920, agreed to sell

the tract of land in controversy to Andrew Jackson Eisenhuth, reciting it as being "the same tract of land conveyed by Thomas E. Proctor and wife to the Elk Tanning Company by deed dated October 1st, 1894, and the same tract of land conveyed by the Elk Tanning Company to the Central Pennsylvania Lumber Company by deed dated May 25th, 1903, and the deed which followed and carried out said agreement of July 23, 1920, contains the same description of the land conveyed as in said agreement.

In the case of *Cooper v. Bushley*, 72 Pa. 252, relied upon by the petitioners, it was held as a matter of law that after the duty to pay taxes on the land is breached and a sale ensues, the owner purchasing at the sale acquires no title but he is being compelled to pay his own taxes with interest and costs for his prior omission.

C. H. McCauley, Jr., at the request of Central Pennsylvania Lumber Company, did, on February 1, 1921, quitclaim his interest in said Warrant 5343 acquired at the tax sale in 1914 to Andrew Jackson Eisenhuth; McCauley delivered the quitclaim deed to Central Pennsylvania Lumber Company, which Company placed the same of record on March 6, 1925; neither the quitclaim deed nor the tax sale purchase was referred to in the deed of Eisenhuth to The Sagamore Big Game Club; from which facts a jury could infer the purpose of the quitclaim deed to be the removal of a cloud from the title to the land conveyed by the Central Pennsylvania Lumber Company to Eisenhuth on December 6, 1920.

The deed of conveyance following the above in defendants' line of title was from Eisenhuth to The Sagamore Big Game Club by deed of June 8, 1921 and recited

the land conveyed as "Being the same tract of land conveyed to the said Andrew Jackson Eisenhuth by deed of the Central Pennsylvania Lumber Company, dated the 6th day of September A. D. 1920. . . ."

From all of the above, the inference is warranted that the parties in the line of title of defendants intended to convey the land in controversy subject to the exceptions and reservations of the gas in Proctor.

(c) that as affecting both tax sales a jury could find that the recitals and reservations contained in the deeds in defendants' line of title recognized the title to the gas and other minerals under the lands conveyed therein to be in plaintiffs through their predecessor in title.

There is no deed of conveyance to which the defendants can point that discloses a reliance by the grantors on either or both of the tax deeds involved. The various grantors described the property they conveyed as being the same tract of land conveyed by the Proctor deed, or described the property they conveyed as being the same tract of land conveyed in a deed later than the Proctor deed, but which, in turn, referred to the Proctor deed as a description of the property conveyed. We treat the legal effect of the recognition of title in another (i. e. Proctor's title to the gas) in our argument on Estoppel by Deed which appears hereinafter. But certainly the recital as to the reservation of title to the gas in the deeds of conveyance even after the tax deeds in question raises at least a question of fact as to what the parties intended to convey by their deeds. See 31 C. J. S. Estoppel, Sec. 37 b. The bringing to the attention of the grantees in the various deeds of conveyance the reserva-

tion of the gas in Proctor gave notice to these various grantees of the outstanding claim in the title to the gas, and if they thought they were actually purchasing the right to the gas, they were at least on notice by their own deeds that there was a claim in another. They cannot thus claim to be innocent purchasers without any knowledge of the outstanding claim of title to the gas. See *Sergeant v. Ingersoll*, 7 Pa. 340; *Pennsylvania Range Boiler Co. v. City of Philadelphia*, 344 Pa. 34, 23 A. 2d 723; *Department of Public Assistance v. Reustle*, 358 Pa. 111, 56 A. 2d 221.

Second: That under the law of Pennsylvania one claiming under a deed is bound by the reservation and recognition of title in another which is contained in it.

Olwine v. Holman, 23 Pa. 279

Elliott v. Moffet, 365 Pa. 247, 252, 74 A. 2d 164.

Third: The tax sales were void for want of acknowledgment in open court.

The Acts of 1804 and 1815 under which the alleged sales are claimed to have been made required the treasurer to acknowledge his tax deeds in open Court of Common Pleas.

The Circuit Court and the District Court erroneously decided that there were valid acknowledgments of the tax deeds under the Pennsylvania Act of April 3, 1804, P. L. 517, 4 Sm. L. 201, Sec. 2 as supplemented by the Act of March 13, 1815, P. L. 177, 6 Sm. L. 299, Sec. 3. These acts require that the tax sale deeds be acknowledged in open court of Common Pleas.

The Common Pleas Court is a Court of Record. Judicial acts in courts of record can be proved only if

some entry thereof is made in the Court's own minute book. See *Commonwealth v. Robinson et al.*, 317 Pa. 321, 176 A. 908 and *Cathcart v. Commonwealth*, 37 Pa. 108. Such entry may be supplemented by memoranda of the Prothonotary or Clerk. *Central Pennsylvania Lumber Company v. Bristol*, 250 Pa. 61, 95 A. 383.

The minute book of the Court of Common Pleas of Elk County contains no entry whatsoever concerning the acknowledgment of any tax deeds or the appearance of the Treasurer for any purpose on the dates on which defendants claim the tax deeds were acknowledged. The District Court erroneously held that notes and memoranda of the Prothonotary of Elk County were in fact the minutes of the Court. See *Lee v. Newland*, 164 Pa. 360, 30 A. 285; and *Osmer v. Sheasley*, 219 Pa. 390, 68 A. 965. The protection given by the Legislature to the owner of unseated land in providing a place to look, viz., the minutes of the Court of Common Pleas, to see if his land has been sold for taxes, is thus defeated.

The Circuit Court did not adopt the reasoning of the lower Court in deciding that the tax deeds were valid, but introduced into the case the Curative Act of Pennsylvania Legislature of May 5, 1941, P. L. 38, Sec. 1, 21 P. S. Sec. 283 which purported to cure the invalidity of a tax deed which was invalid because the "... records of the court failed to show a minute of such acknowledgment in open court ...." This act contained no provision whatsoever for the redemption by the owner of his land after the validation of the tax sale.

By virtue of the aforementioned acts under which the tax sales were held, the owner of unseated land was given the right to redeem his land from a valid tax sale

within two years. 1815, March 13, P. L. 177, 6 Sm. L. 299, Sec. 4, 72 P. S. Sec. 6091—1931 ed. The Act of 1941 purported to validate such tax sales where records failed to show a minute of the acknowledgment of the tax deed in open Court. The owners of land had a vested right to redeem their land if a valid tax sale occurred under such tax sales acts. The Act of 1941 failed to provide the owner any right to redeem his land even though the Act purported to validate such sale as is presently involved. The Court held in the case of *City of Allegan, Mich., v. Consumers' Power Co.*, 72 Fed. 2d 477, at page 480, that even though the Legislature could do subsequently what it originally had the power to do, it could do so only ". . . providing no vested interests have meanwhile arisen." The rights of plaintiffs were already vested as of 1941.

The Curative Act of 1941 neither complies with the United States Constitution nor the Constitution of Pennsylvania. Amendment V of the Constitution of the United States provides that "No person shall . . . be deprived of life, liberty or property, without due process of law . . ." And Article I, Sec. 9, of the Constitution of Pennsylvania provides that: ". . . nor can be deprived of his . . . property, unless by the judgment of his peers or the law of this land." These due process provisions ". . . inhibit the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Hess v. Westerwick, 366 Pa. 90, citing *Ochoa v. Hernandezy Morales*, 230 U. S. 139, at page 161.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

HERBERT R. CARROLL
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APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 12,715

THOMAS E. PROCTOR, 2ND, JOHN RIKER PROCTOR, ESTHER B. PROCTOR, MARY P. CASE, EMMA M. RICE, GERALDINE M. CRAIG, NEIL W. RICE, HILDA R. AYER, THOMAS E. P. RICE AND THOMAS W. REYNOLDS, DAVID BROUDE AND BOSTON SAFE DEPOSIT AND TRUST COMPANY, Trustees Under the Last Will and Testament of THOMAS E. PROCTOR, Deceased,

Appellants

v.

THE SAGAMORE BIG GAME CLUB, THE SYLVANIA CORPORATION, UNITED NATURAL GAS COMPANY, NATIONAL FUEL GAS COMPANY, FRANK G. ALTMAN, H. P. BOARTS, F. E. CARROLL, W. L. CARROLL, A. J. EISENHUTH, H. U. FLICKINGER, JOHN W. FLICKINGER, BERTHA E. JONES SHEARER, JOHN RUMMEL, A. C. THOMAS, WILLIAM WALKER, D. D. FLICKINGER, ANTONIA JOHNSON, CLYDE K. MOORE, GEORGE C. SCHRECONGOST, R. L. SEGER, L. E. THOMAS AND E. C. WAREHAM.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 3, 1959

Before GOODRICH and STALEY, *Cricuit Judges*, and STEEL, *District Judge*.

Decided—Mar. 24, 1959
Pet. for Rehearing—April 8, 1959
Pet. Denied—April 27, 1959

Opinion of the Court

(Filed March 24, 1959)

By STEEL, *District Judge*

This is an appeal from a summary judgment for defendants.

At stake is the ownership and right to possession of natural gas underlying unseated lands[1] known as Warrant 5343 in Elk County, Pennsylvania. A discovery well completed in April 1953 and seven subsequent wells, the last of which was completed in September 1954, demonstrated that these lands had substantial value because of the existence of subsurface natural gas in commercial quantities. The present action followed.

Plaintiffs claim to be either the legal or equitable owners of the natural gas underlying and produced and sold from the lands. Defendants are rival claimants who are alleged to be trespassers. They comprise persons and corporations claiming ownership of the warrant with royalty rights in the gas, a lessee-producer, and a purchaser of the gas. Plaintiffs seek possessory, monetary and injunctive relief, and an adjudication that

1. When lands fail to disclose improvements indicating a personal responsibility of the owner for the taxes, the assessor must return the lands as unseated. *Hutchinson v. Kline*, 199 Pa. 564, 49 Atl. 312, 313 (1901); Whitworth, *Tax Sale and Titles and the Evidence of the Same in Pennsylvania*, Chapter IV, page 52, § 29 (1900).

defendants hold the gas as trustees for plaintiffs. Plaintiffs made timely demand for a trial by jury.[2]

All parties have properly relied upon Pennsylvania law as dispositive of their rights, since the sole basis of jurisdiction of the District Court was diversity of citizenship.

In determining whether summary judgment for defendants was properly granted, we must accept as true all facts and inferences therefrom which tend to support plaintiffs' claim regardless of any denial thereof by defendants. It is not our province to resolve disputed questions of fact, but only to determine whether genuine issues of material fact exist. The Court below found, and we think correctly, that if all of the facts and inferences therefrom relied upon by plaintiffs were accepted as true, defendants were entitled to judgment as a matter of law.

Preliminarily, it is desirable to say a word about the record upon which our decision will be based. Many of plaintiffs' arguments pertaining to its equitable interest in the gas rest upon unsworn statements by plaintiffs' attorneys as to the contents of documents and the existence of facts detailed in Plaintiffs' Statement of Position and Plaintiffs' Reply to Defendants' Statement of Position. These were filed for use at a pre-trial conference at a time when a trial was in contemplation. These self-serving unverified statements of fact asserted by plaintiffs are not the type of proof which Rule 56(c) requires for the resolution of a motion for summary judgment.

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2. It is assumed that the action is appropriate to be tried to a jury, although we have given no consideration to this question.

Nor are the unsworn statements concerning the contents of documents adequate under Rule 56(e). Nevertheless, it appears from the position of the defendants at pre-trial, the decision of the Court below, and the brief of the defendants in this Court, that the defendants, both in this Court and in the District Court, were willing to accept as true for the purpose of testing defendants' motion for summary judgment all of the factual statements contained in plaintiffs' statements of position.[3] Accordingly, we shall likewise do so.

An itemization of each link in the chain of title through which the parties claim is not necessary. It is enough to say that plaintiffs base their title upon that of their deceased ancestor, Thomas E. Proctor, Sr., to whose rights, if any, they have succeeded. The title and

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3. The idea of testing plaintiffs' case by a motion for summary judgment was advanced at a pre-trial conference at which Plaintiffs' Statement of Position and Plaintiffs' Reply to Defendants' Statement of Position were discussed. Both parties expressed the view that the filing of such a motion would be desirable and defendants indicated they would be willing to have their motion tested by conceding the truth of the "extraneous matters" which plaintiffs had adduced at the conference. Transcript Pre-Trial, September 23, 1959 (Doc. 75), pp. 8, 18, 36, 39, 41-42.

The opinion of the District Court discussed many of the unverified facts relied upon by plaintiffs. So did defendants in their brief in this Court. Defendants made no objection to the statements except on the grounds of relevancy.

Some of the statements made by plaintiffs constituted legal conclusions. These conclusions were not admitted by defendants. Nor will they be accepted as true by us except as such conclusions are warranted by the factual statements and applicable legal principles.

other interests claimed by defendants derive through one G. W. Childs who purported to purchase Warrant 5343 at a tax sale in 1894 immediately prior to which Proctor was the owner.

To prevail, plaintiffs must first establish that Proctor's title, either legal or equitable, survived the tax sale. A plaintiff seeking to recover the possession of an estate in land must do so upon the strength of his own title, not upon the imperfections in the title of a defendant. *Taylor v. Taylor*, 228 Pa. 424, 77 Atl. 663 (1910); *Zeller v. American International Corp.*, 271 Pa. 472, 114 Atl. 778 (1921); *Henry v. Grove*, 356 Pa. 541, 52 A.2d 451 (1947). Subsurface gas in place is an estate in land. *F. H. Rockwell & Co. v. Warren County*, 28 Pa. 430, 77 Atl. 665 (1910).

I.

On June 5, 1893 Proctor acquired title to Warrant 5343 from Bigler et al. At the time the taxes for 1892 and 1893 had been assessed against the warrant as unseated lands, were unpaid, and constituted a lien upon the warrant. On June 11, 1894 the treasurer of Elk County sold the warrant for the 1892 taxes. G. W. Childs was the purchaser and he received a deed from the treasurer dated June 11, 1894.

The tax sale and the treasurer's deed, if valid, conferred upon Childs a fee simple title. Act of April 3, 1804, P. L. 517, 4 Sm. L. 201 §2; *White v. First National Bank of Emporium*, 24 F. Supp. 290, 293 (M. D. Pa. 1938). This included not only the surface of the land but subsurface natural gas as well. See *Powell v. Lantzy*, 173 Pa. St. 543.

34 Atl. 450 (1896).[4] On June 8, 1898 Childs assigned his tax deed to Elk Tanning Company. The claim of defendants rests upon the tax sale to Childs, the assignment of the tax deed to Elk Tanning Company, and subsequent conveyances and leases.

On October 1, 1894, three months after the tax sale, Proctor purported to convey the same warrant to Elk Tanning Company by a deed which reserved to himself and to his heirs and assigns, all of the natural gas in, upon or under the lands. Plaintiffs base their claim to the natural gas on the title which Proctor acquired from Bigler and on the reservation in Proctor's deed to Elk Tanning Company, even though the latter deed was not executed until three months after the delivery of the tax deed to Childs. Plaintiffs argue that the gas reservation in the Proctor deed was valid because the prior tax deed to Childs was invalid and hence Proctor's title was not divested thereby. The invalidity of the tax deed, plaintiffs say, was due to the failure of the treasurer to acknowledge the tax deed in open court as was required by Section 2 of the Act of April 3, 1804, P. L. 517, 4 Sm. L. 201. This omission is established, plaintiffs assert, by the failure of the "Trial List and Court Minutes" of the Court of Common Pleas of Elk County to make any reference to the acknowledgement. But the silence of the minutes in this regard does not invalidate the sale if

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4. If there had been a severance of the title of the gas from the title of the surface prior to the assessments for 1892 and 1893, and if each of the several interests had been separately assessed, a tax sale would have carried with it the title only to the particular estate as to which taxes were in default. *F. H. Rockwell & Co. v. Warren County, supra.* But there had been no such prior severance.

in fact the tax deed was acknowledged in open court. The Act of May 5, 1941, P. L. 38 §1; 21 P. S. §283 was enacted to make tax titles secure against just such an argument as plaintiffs make.[5]

The evidence is uncontroverted that the acknowledgment did in fact take place in open court on July 3,

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5. 21 P. S. §283 provides:

"Whenever heretofore any land has been sold by the county treasurer of any county for the purpose of securing the payment of delinquent taxes which were assessed and levied against such land, and the county treasurer in pursuance of such sale executed a deed for said lands, and the acknowledgment of such deed by the county treasurer was defective in any respect, or where the records of the court failed to show a minute of such acknowledgment in open court, such sale and such deed shall not be invalidated by reason of such defective acknowledgment, if, in all other respects, the laws relating to the holding of such sale were fully complied with and the deed was, in fact, acknowledged before a judge of said county; and all such treasurers' sales and treasurers' deeds are hereby ratified, confirmed and validated; and the title to any such land purchased by any person or by the county commissioners of any county at such treasurers' sale and the deed executed and acknowledged to such purchaser is herey declared to be as valid as if such deed had been acknowledged in open court and a proper minute thereof made in full conformity with the law relating thereto. 1941, May 5, P. L. 38, §1."

Plaintiffs' argument that the "Trial List and Court Minutes" are irrebuttable proof that the treasurer's deed was not acknowledged in open court is based upon decisions which antedate the enactment of 21 P. S. §283. Defendants take exception to the interpretation which the plaintiffs have placed on the decisions. In view of the statute this interpretive controversy need not be resolved.

1894. The certificate of the Prothonotary endorsed on the deed says so, and it is prima facie evidence of that fact. Act of May 11, 1911, P. L. 257, §1, 21 P. S. §48. An entry in the book entitled "Acknowledgment of Treasurer's Deeds" kept in the Office of the Prothonotary in Elk County likewise attests the open court acknowledgment on July 3, 1894. The "Trial List and Court Minutes" reveal that the Court of Common Pleas of Elk County sat on July 3, 1894. Plaintiffs' contention that the tax deed was invalid because it was not acknowleged in open court is untenable.

It is of no moment that Proctor, in his deed to Elk Tanning Company, reserved the natural gas to himself and to his heirs and assigns. If the tax sale to Childs cut off all of Proctor's legal title to the warrant, including his title to the natural gas, subject only to his right of redemption under Pennsylvania law[6]—as we hold that it did—then when Proctor gave his deed to Elk Tanning Company, he had no legal title in the surface to convey to Elk Tanning Company or in the natural gas to reserve to himself. The reservation could not revive in Proctor the legal title which he had lost by the earlier tax sale.

II.

Plaintiffs next contend that even if the treasurer's acknowledgment of the tax deed to Childs was valid and Childs purchased a good legal title thereby, nevertheless Proctor retained an equitable interest in the gas. Plain-

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6. In a request by defendants that plaintiffs admit certain facts, plaintiffs said in part:

> "The plaintiffs admit that if a redemption was necessary to avoid said alleged tax sale, no such redemption was made."

tiffs say that they "proposed to prove facts" showing an agreement between Proctor and Elk Tanning Company under which the latter assumed to clear Proctor's title to Warrant 5343 of all debts and encumbrances through 1892 and that it did so either by way of payment of the tax or redemption of the warrant from the sale; or alternatively, that Elk Tanning Company failed to carry out its commitment as a result of which the warrant was acquired by it by fraud. The effect of the summary judgment, plaintiffs say, is to deprive them of their right to present to the jury for its determination the issues of payment, redemption and fraud.[7]

The difficulty with this argument is that there are no facts before us from which the existence of an agreement between Proctor and Elk Tanning Company such as plaintiffs postulate can be found either directly or by implication.[8] Plaintiffs' proposal to prove the agreement at the trial is not enough to defeat the summary judgment motion. The liberality of our treatment of the facts

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7. Statements in the record indicate a concession by plaintiffs that Proctor did not pay the taxes on the warrant. Other parts of the record, however, make it clear that the concession related only to a direct payment by Proctor, and that plaintiffs reserved the right to contend that the tax sale and its ramifications were equivalent in law to a payment of the tax on Proctor's behalf. Pre-trial Transcript (Doc. 75) pp. 23-26.

Plaintiffs have admitted that the warrant was not redeemed (see f.n. 6), without any reservation comparable to that pertaining to the issue of payment.

8. If in fact such an agreement did exist, other impediments to plaintiffs' recovery immediately suggest themselves, but a discussion of them would be superfluous.

included in plaintiffs' statements of their position cannot be stretched to the point where we accept as true what plaintiffs characterize as "the well-founded supposition" that at one time such an agreement existed; particularly as defendants have refused to concede the existence of such an agreement. A party who desires to resist a motion for summary judgment cannot hold back his evidence until trial, but must bring it before the Court when the motion is heard so that it may then be judicially evaluated. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 473 (2d Cir. 1943); 6 Moore Federal Practice, ¶ 56.11 (2d Ed.).

But wholly apart from any agreement between Proctor and Elk Tanning Company such as plaintiffs hypothesize, it is at least inferable that the tax sale purchase was simply a means whereby Elk Tanning Company, acting through its president Childs, acquired title to Warrant 5343 in furtherance of a written agreement dated January 25, 1893 between Proctor and other tannery owners, including Childs, to consolidate their businesses and bark lands in United States Leather Company; and that the consolidation was effected by Proctor and the other tanners by conveying their properties, including Warrant 5343, to wholly owned subsidiaries of United States Leather Company, including Elk Tanning Company, in consideration for stock of the latter company.[9] The agreement of January 25, 1893 expressly provided that

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9. While Warrant 5343 was not owned by Proctor when the January 25, 1893 contract was entered into, it is not unlikely that its acquisition was in contemplation

At the time when the January 25, 1893 contract was entered into Elk Tanning Company had not been organized.

when the bark lands were conveyed, the oil, gas and minerals should be reserved to the grantors. Other evidence tends to confirm this intention. It can be inferred, therefore, that when Childs acquired the tax deed for Elk Tanning Company, the latter acquired title to a larger estate than was intended because of a mutual mistake of law as to the effect of the transaction. If this were so, Elk Tanning Company, was unjustly enriched and a constructive trust in the natural gas arose in which Proctor and his successors in interest were the beneficial or equitable owners. Restatement, Restitution §§ 48, 50, 160 (Comment a.), 163; 3 Scott on Trusts §§462.5, 465, 466. Pennsylvania has recognized the latitudinous principle that a constructive trust may arise against one who has been unjustly enriched even though he has been guilty of no act of wrongdoing. *Dubin Paper Co. v. Insurance Co. of North America,* 361 Pa. 68, 63 A.2d 85, 94 (1949).

But even assuming that a constructive trust did arise in Proctor's favor following the tax sale, still plaintiffs are barred from maintaining the action. Plaintiffs' asserted rights came into being in 1894, more than 60 years before the present suit was begun. The District Court held that the action was barred by the Third Section of the Act of April 3, 1804, P. L. 517; 4 Sm.L. 201.[10] Whether this statute has application to the type of claim here involved need not be determined. For the five-year period of limitation imposed by the Act of April 22, 1856, P.L. 532 §6, 12 P.S. § 83 was intended to

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10. This provides:

". . . [N]o action for recovery of said lands [unseated lands sold at tax sale] shall lie, unless the same be brought within five years after the sale thereof, for taxes as aforesaid . . .".

protect landholders from just such an equitable claim as is here asserted.[11] It is a statute of repose which was intended to insure greater certainty of title and make more secure the enjoyment of real estate against a claim based upon an "implied trust". *Ross v. Suburban Counties Realty Corporation*, 356 Pa. 126, 51 A.2d 700, 701 (1947). The term "implied trust" in 12 P.S. § 83 includes a constructive trust. *McKean & Elk Land & Imp. Co. v. Clay*, 149 Pa. St. 277, 24 Atl. (1892); *Johnson v. Hobensack*, 318 Pa. 305, 178 Atl. 40 (1935); *Gast v. Engel*, 369 Pa. 137, 85 A.2d 403 (1952).

Once a constructive trust has arisen, even the ignorance of the beneficiary of his rights will not toll the period of limitation fixed by 12 P.S. § 83 unless the trust was the result of a fraud. The statute says as much.

Fraud can be proven only by evidence which is clear, explicit and unequivocal. See, *e.g.*, *Modern Baking Co v. Orringer*, 271 Pa. 152, 114 Atl. 264 (1921); *Martin v. Baird*, 175 Pa.St. 540, 34 Atl. 809, 812 (1896); *Bayout v. Bayout*, 373 Pa. 549, 96 A.2d 876 (1953); *Wagner v. Somerset County Memorial Park*, 372 Pa. 338, 93 A.2d 440 (1953). Not only is the record devoid of proof which meets this high standard, but indeed it is barren of any evidence of fraud in the circumstances attending the

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11. 12 P.S. § 83 provides:

"No right of entry shall accrue, or action be maintained . . . to enforce . . . any implied or resulting trust as to realty, but within five years after such . . . trust accrued . . .: Provided that as to anyone affected with a trust, by reason of his fraud the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same . . ." (Inapplicable language deleted).

tax sale. At most, the evidence points to a bona fide mistake as to its legal consequences. In these circumstances the statute of limitations presents an insuperable bar to the action.

The view which we have taken of the matter makes it unnecessary for us to consider other arguments advanced by the parties.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 238

THOMAS E. PROCTOR 2nd, JOHN RIKER PROCTOR, ESTHER B. PROCTOR, MARY P. CASE, EMMA M. RICE, GERALDINE M. CRAIG, NEIL W. RICE, HILDA R. AYER, THOMAS E. P. RICE; and THOMAS M. REYNOLDS, DAVID BROUDE and BOSTON SAFE DEPOSIT AND TRUST COMPANY, Trustees Under the Last Will and Testament of THOMAS E. PROCTOR, Deceased,

Petitioners

vs.

THE SAGAMORE BIG GAME CLUB, THE SYLVANIA CORPORATION, UNITED NATURAL GAS COMPANY, NATIONAL FUEL GAS COMPANY, FRANK G. ALTMAN, H. P. BOARTS, F. E. CARROLL, W. L. CARROLL, A. J. EISENHUTH, H. U. FLICKINGER, JOHN W. FLICKINGER, BERTHA E. JONES SHEARER, JOHN RUMMEL, A. D. THOMAS, WILLIAM WALKER, D. D. FLICKINGER, ANTONIA JOHNSON, CLYDE K. MOORE, GEORGE C. SCHRECONGOST, R. L. SEGER, L. E. THOMAS and E. C. WAREHAM,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 238

Thomas E. Proctor 2nd, John Riker Proctor, Esther B. Proctor, Mary P. Case, Emma M. Rice, Geraldine M. Craig, Will W. Rice, Hilda R. Ayer, Thomas E. P. Price; and Thomas M. Reynolds, David Bronde and Boston Safe Deposit and Trust Company, Trustees Under the Last Will and Testament of Thomas E. Proctor, Deceased,

Petitioners

vs.

The Sagamore Big Game Club, The Sylvania Corporation, United Natural Gas Company, National Fuel Gas Company, Frank G. Altman, H. P. Boarts, F. E. Carroll, W. L. Carroll, A. J. Eisenhuth, H. C. Flickinger, John W. Flickinger, Bertha E. Jones Shearer, John Rummel, A. D. Thomas, William Walker, D. P. Flickinger, Antonia Johnson, Clyde K. Moore, George C. Schreengost, R. E. Seger, L. E. Thomas and E. C. Wareham,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

In response to the Petition of plaintiffs to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, which affirmed a judgment of the United States District Court for the Western District of Pennsylvania in the above entitled action, Respondents pray that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the District Court is reported in 166 F. Supp. 463. The opinion of the Court of Appeals is reported in 265 F. (2) 196.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1959. Plaintiffs' Petition for a Re-Hearing was denied on April 27, 1959. Petition for Writ of Certiorari was filed July 22, 1959. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 56. Summary Judgment of Federal Rules of Civil Procedure:

(c) ". . . The Judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ."

(e) ". . . Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . ."

QUESTIONS PRESENTED

1. Where plaintiffs filed a Motion for Summary Judgment, following a similar Motion by defendants ten days earlier, by which they moved the Court to enter summary judgment for plaintiffs in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure,

> "on the ground that the pleadings, the admissions, the replies to interrogatories, the parties' statements of position and the replies thereto and the rebuttals thereof, and all and singular any further matters of record unspecified herein in the case, show that the plaintiffs are entitled to judgment against the defendants as a matter of law,"

does not such Motion constitute a submission to the Court as a matter of law of plaintiffs' right of recovery, and can the plaintiffs, after an adverse decision by the Court, successfully claim that they have been deprived of a trial by jury?

2. Are self-serving unverified statements of fact by plaintiffs' attorneys, filed at pre-trial conference, but which were not at any time followed by an offer of evidence admissible in the case, or do they constitute such proof as is required for the resolution under Rule 56(c) and 56(e) of a Motion for Summary Judgment?

3. Where, as in this case, jurisdiction depends solely on diversity, and the question involved is to be determined by the laws of Pennsylvania, statutory and decisional, and both Federal Courts below have decided that question in conformity with Pennsylvania law, is that question now subject to review in this Court?

STATEMENT

This action involves the title and right to possession to a tract of 1400 acres of unseated land in Benezette Township, Elk County, Pennsylvania, being Warrant 5343. Unseated lands, under the law of Pennsylvania, are alone and solely liable for the tax assessed thereon, there being no charge upon the owner thereof for such tax. (*Powell vs. Lantzy*, 173 Pa. 543, at p. 547 and 550.)

Title to the Warrant vested in Thomas E. Proctor, Sr., by deed dated June 5, 1893. When that conveyance was made, the taxes for 1892 and 1893 on the land were unpaid and were a lien thereon. Proctor having allowed the 1892 taxes to remain unpaid for the statutory period of two years, the land was sold by the County Treasurer at public sale on June 11, 1894, and was bid in by George W. Childs for the amount of the defaulted taxes and costs. The County Treasurer's deed to George W. Childs, acknowledged in open Court on July 3, 1894, was recorded in Elk County Deed Book W at page 468 (Appendix to Appellants' Brief in Circuit Court, 7a). Both the Courts below (the District Court and the Circuit Court); following *Central Pennsylvania Lumber Co. v. Bristol*, 250 Pa. 61, found the foregoing facts to be uncontroverted (opinion, District Court, 166 F. Supp. 465, at page 468; opinion Circuit Court, 265 F. (2) 196, at page 199).

George W. Childs and wife assigned his deed to Elk Tanning Company on June 28, 1898, which was recorded in Elk County Deed Book W at page 480. The Courts below

found these facts, and that the claim of the defendants rests upon the tax sale to Childs, the assignment of the tax deed to Elk Tanning Company, and subsequent conveyances and leases.

The District Court and the Circuit Court both held that the acknowledgment of the Treasurer's deed delivered to George W. Childs did in fact take place in open Court on July 3, 1894 (District Court opinion, 166 F. Supp. 465, at page 470; Circuit Court opinion, 265 F. (2) 196, at page 200).

Under the law of Pennsylvania a deed from a County Treasurer for unseated land sold for the nonpayment of taxes, if the sale is otherwise regular (the regularity of the sale of June 11, 1894, being admitted in this case), becomes incontestable and valid if there is no redemption from the tax sale within two years from the date thereof. Both of the Courts below found as a fact that there was no redemption from the tax sale in question (District Court opinion, 166 F. Supp. 465, top of page 469, and Circuit Court opinion, 265 F. (2) 196, Note 6, page 201).

In respect of the question of redemption, the District Court and the Circuit Court both applied the law as stated in the Act of April 3, 1804, 4 Sm. L. 201, and did not decide the question of redemption under the provisions of the Act of May 5, 1941, P. L. 38, Section 1; 21 P.S. 283, as inferred by the Petitioners. (See opinion of the Circuit Court, 265 F. (2) 196, at page 200.) However, the contention that the Act of 1941 denied the right of redemption is erroneous.

The second Treasurer's sale of this land for defaulted taxes of 1912 and 1913 occurred on June 8, 1914, upon an

assessment to Central Pennsylvania Lumber Company. The purchaser at such public sale was C. H. McCauley, Jr., who bid the property in for the unpaid taxes and costs. The County Treasurer's deed to McCauley was duly acknowledged and was recorded in Elk County Deed Book 138 at page 99. McCauley and wife conveyed without reservations or exceptions, to Andrew Jackson Eisenhuth and wife by deed recorded in Elk County Deed Book 86 at page 518. The Central Pennsylvania Lumber Company also conveyed to Andrew Jackson Eisenhuth, with no exceptions or reservations, by deed recorded in Elk County Deed Book 80 at page 451 (see Appellants' Appendix to Brief in Circuit Court, 66a). Andrew Jackson Eisenhuth and wife conveyed to The Sagamore Big Game Club, a defendant, by deed recorded in Elk County Deed Book 81 at page 217.

Jurisdiction being in the Federal Court by diversity of citizenship only, and title to land in Pennsylvania being in question, the law governing the case is the law of Pennsylvania, as held by *Guaranty Trust Co. vs. York*, 326 U.S. 99, and *Erie Railroad Co. vs. Tompkins*, 304 U.S. 63; and both the Federal District Court and the Circuit Court found the law of Pennsylvania, both statutory and decisional, supported the contentions of defendants.

Motions were filed by both defendants and plaintiffs requesting the Court to enter summary judgment upon the whole record as a matter of law. The District Court, after consideration, entered judgment in favor of the defendants and against the plaintiffs which judgment was affirmed by the Circuit Court of Appeals.

REASONS FOR REFUSING THE PETITION FOR CERTIORARI

The key to the determination by the Supreme Court of this Petition for a Writ of Certiorari is (1) the filing by plaintiffs in the District Court of "Plaintiffs' Cross-Motion for Summary Judgment"; (2) the Pennsylvania Statutes of Limitation; and (3) laches of plaintiffs over a period of sixty years, all of which are ignored by counsel for plaintiffs in their Petition.

(1) That Motion was in the following form (Appendix to Brief of Appellants filed in the Circuit Court, page 123a):

"Plaintiffs' Cross Motion for Summary Judgment

"The plaintiffs, Thomas E. Proctor, 2d, et al., by their attorneys, Herbert R. Carroll, Esquire, John C. Youngman, Esquire, John H. Cartwright, Esquire, and Evans, Ivory & Evans, Esquires, hereby move the Court to enter summary judgment for the plaintiffs, against The Sylvania Corporation and United Natural Gas Company, defendants, in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings, admissions, the replies to interrogatories, the parties' statements of positions and the replies thereto and the rebuttals thereof, and all and singular any further matters of record unspecified herein in the case, show that

the plaintiffs are entitled to judgment against said defendants as a matter of law.

Herbert R. Carroll
John C. Youngman
John H. Cartwright
Evans, Ivory & Evans
Attorneys for Plaintiffs

October 21st, 1957."

The filing date was ten days after the filing by the defendants of a similar motion.

The events in the course of this litigation leading up to the filing of these motions are substantially as follows:

A motion by the defendants for an order on plaintiffs to file an abstract of title was denied by the Judge of the District Court (128 F. Supp. 885, 889), in which decision also the action was dismissed as to the National Fuel Gas Company. Instead, the Court suggested procedure under Federal Rule 36 by the filing on behalf of either or both parties of Requests for Admissions, which was done. Thereafter, a pre-trial conference was set by the Court at Pittsburgh on September 26, 1957, for the consideration of the Requests for Admissions and Answers thereto at a time when the trial of the cause was in contemplation (see opinion of Circuit Court of Appeals, 265 F. (2) 196, 199). The net result of such pre-trial conference is shown by the following quotations from the record as contained in the Appendix to Brief of Defendants, Appellees, submitted with their brief to the Circuit Court:

Page 4b of Appendix referred to:

"The Court: You do not make any contention, do you, Mr. Carroll, that Thomas Proctor paid those taxes for that year in question, do you?

"Mr. Carroll: We do not."

Page 7b of Appendix referred to:

As to the Treasurer's Acknowledgment Book B showing the acknowledgment of deed to George W. Childs in Open Court:

"The Court: Well, * * * I am going to leave it that the Treasurer's Acknowledgment Book B shows the transaction in accordance with the defendants' request for admission. Now, the effect of that failure, if any, of the Court record to show or fail to show the Treasurer appeared there, will be for the Court to decide * * *

"Mr. Carroll: If the Court please, I believe all we have there is the legal effect of certain records. * * *

"The Court: (to Mr. Carroll) They are trying to get you to admit that the tax sale wiped out your oil and gas rights and you say no. They assert that there was no redemption from that sale.

"Mr. Carroll: I dare say, your Honor, the record is conclusive."

Appendix referred to page 9b:

Defendants' Request 24 alleging that no redemption from the tax sale was ever exercised by Thomas E. Proctor or by anyone for him or by his heirs at law:

"Answer: The plaintiffs admit that if a redemption was necessary to avoid said alleged tax sale, no such redemption was made."

Page 22b of Appendix referred to:

At pre-trial hearing before Judge Willson on September 13, 1957, in a discussion as to whether the issue

was solely one for the Court, the Court said, addressing Mr. Carroll:

"The Court: The point is, the Court is going to have to decide whether that title that the Sagamore got in 1920 is subject to all those matters you people raise, whether somebody must have looked outside the records and docket entries, treasurers' sales and various deeds in Elk County. That is the issue in this case, do you agree with that?

"Mr. Carroll: The defendants say so, if the Court please. We say one examining the title to this tract of land in Elk County is not obliged under any circumstances to go beyond what might appear on the public records of the several offices of Elk County.

"The Court: That is right. I understand that is your position.

"Mr. Carroll: Now, of course, we take a much broader view.

"The Court: In other words, if I decide they are correct from that viewpoint, have you got a title?

"Mr. Carroll: Not in this Court, your Honor.

"The Court: * * * Why don't you say yes or no then? In other words, if their position is correct that they don't have to look beyond the records of Elk County, your case goes out the window. Is that right?

"Mr. Carroll: That is right."

Page 24b of Appendix:

At pre-trial hearing September 23, 1957:

"The Court: Mr. Carroll, to go a step further, is it your contention that you can show that the Treasurer

of Elk County actually received those taxes for this year in question?

"Mr. Carroll: No, your Honor, we can't."

Page 25b of Appendix:

The following excerpt from Plaintiffs' Reply to Defendants' Statement of Position relative to an alleged contract in writing between Elk Tanning Company and Proctor:

"It is *apparent* that Elk Tanning Company sometime during the year 1893 acquired an equitable title to or interest in the land in question; furthermore, *there is little doubt* that such title or interest was acquired by virtue of a written agreement made in 1893 between Proctor and the company. There is nothing in the public record to evidence such title with *clarity or certainty*. Many of the old records of Proctor and of his estate, and all those of Elk Tanning Company and of United States Leather Company which pertained directly thereto, appear to *have been long since destroyed*. Nevertheless, ample evidence remains, which points to the inescapable conclusion of the fact of the existence of such equitable title or interest." (Italics supplied.)

The background of these admissions by counsel in open Court and the answers to Requests for Admissions prompted the Court to suggest that a motion or motions for Summary Judgment be filed under the Federal Rules. In such an atmosphere of reluctant, though binding, concessions as to all the alleged facts that possibly could do the plaintiffs any good, motions under Federal Rule 56 for Summary Judgment were filed, first by the defendants

and ten days later, after ample time for consideration, by the plaintiffs.

Having asked the Court in such motion to dispose of the whole case as a matter of law, and having gotten an adverse decision from the Court—in other words, having gambled and lost—they now come forward with the amazing proposition that they intended their motion to be a waiver of a jury trial only if they got a decision from the Court and judgment in their favor, and now insist that they have been wrongfully deprived of their right of trial by jury. On this record there is no genuine issue as to any material fact for a jury. (Opinion Circuit Court, 265 F. (2) 196, page 198).

The form of the Motion for Summary Judgment as above quoted appears to clearly indicate that the plaintiffs intended to submit, and did submit, their whole case to the Court for disposition as a matter of law, without any reservation whatsoever.

Where defendants filed a Motion for Summary Judgment and plaintiffs filed a counter Motion for Summary Judgment, the plaintiffs thereby conceded that there was no genuine issue as to any material fact, and therefore judgment on the record was proper. The following authorities support this position:

Fox vs. Johnson and Wimsatt, 127 Fed. 2d 729;

Steiner vs. United States, 36 F. Supp. 496;

Sena vs. American Turquoise Company, 220 U.S. 497.

This doctrine of itself will sustain the judgment entered on the law in this case in favor of the defendants.

In the face of the facts recited from the record, the Petition under consideration contains nothing in support of the position that plaintiffs have been deprived of their right of trial by jury, except a reiteration and repetition of unverified statements of counsel, devoid of any evidentiary value, which neither are nor could be of any avail in the disposition of Plaintiffs' Cross-Motion for Summary Judgment under Rule 56(c) or 56(e), and which are definitely negatived by the admissions of plaintiffs hereinbefore set forth (Circuit Court Opinion, 265 F. (2) 196, at page 199).

(2) The Statutes of Limitation in Pennsylvania are insuperable bars to the maintenance of any action by the plaintiffs here.

There are two Pennsylvania statutes, the Act of April 3, 1804, P. L. 517; 4 Sm. L. 201, which provides:

> "No action for recovery of said lands (unseated lands sold at tax sale) shall lie unless the same be brought within five years after the sale thereof for taxes as foresaid * * *."

Also, the Act of April 22, 1856, P. L. 532, §6; 12 P. S. 83, which provides (Both quotations are from the report of the case in 265 F. (2) 196, at page 202):

> "No right of entry shall accrue, or action be maintained * * * to enforce * * * any implied or resulting trust as to realty, but within five years after such * * * trust accrued * * *; provided, that as to any one affected with a trust, by reason of his fraud, the said limitation shall begin to run only from the discovery thereof, or when, by reasonable dlligence, the party

defrauded might have discovered the same * * *"
(Inapplicable language deleted.)

Quoting from the opinion of the Circuit Court, 265 F.
(2) 195, at page 202:

"Fraud can be proven only by evidence that is clear, explicit and unequivocal (citing cases).

"Not only is the record devoid of proof which meets this high standard, but it is barren of any evidence of fraud in the circumstances attending the tax sale * * *. In these circumstances, the Statute of Limitations presents an insuperable bar to the action."

These statutes had been in force in Pennsylvania, the Act of 1804 for 90 years, and the Act of 1856 for 38 years, at the time of the tax sale, and were binding upon Thomas E. Proctor and his heirs at law, the plaintiffs in this action.

In a recent case in Pennsylvania, *Rose vs. Suburban County Realties Corporation*, 356 Pa. 126, 129, it was held that:

"Where fraud is alleged the trust is barred within five years of the discovery of the fraud or the time by the exercise of reasonable diligence it should have been discovered."

If there was fraud at the tax sale of 1894, such as now alleged, Proctor would have had knowledge of it and the simple thing for Proctor to have done would have been to have brought his action to defeat that sale, or to have gotten a transfer from Childs of the tax deed received from the County Treasurer.

No attempt is made in the Petition for Certiorari to surmount this barrier to maintaining an action.

(3) The plaintiffs are estopped by their laches over a period of 60 years from asserting any claim to the land in question or the gas thereunder.

Not from 1894, the date of the tax sale which disposed of Proctor's interest, to the year 1954, the date of bringing this suit, was there the faintest suggestion that Proctor or his heirs laid any claim to this Warrant or any part of it. The plaintiffs' claim is a stale one, a very, very stale one of the kind that Pennsylvania decisions and Federal decisions alike have over and over stigmatized as having no appeal to the conscience of a Court of Justice. See *Goggins vs. Risley*, 13 Pa. Superior Ct. 316, 322; *Kinter vs. Commonwealth Trust Company*, 274 Pa. 436, 442; *Edwards vs. Western Maryland Railway Company*, 268 Pa. 228, 230; *Patton vs. Commonwealth Trust Company*, 276 Pa. 95, 99; *Thompson vs. Roe*, 16 U.S. Supreme Court Reports 385 (22 Howard 422), in which case the Court said:

> "In this case, the owners of the tax title have had the possession, paid the taxes, built and made valuable improvements on the lot, in the presence of the former owners, for nearly twenty years. Under such circumstances a Court of Justice should be unwilling to exercise any judicial ingenuity to forfeit even a tax title, where the former owners have been so slow to question its validity."

Under the Pennsylvania Statute of March 28, 1806, 4 Sm. L. 336, it was the duty of every holder of unseated land to furnish the County Commissioners a statement describing the tract, from which it became the duty of the Commissioners to assess the same for taxation. This obligation was not assumed by the plaintiffs on the purported

reserved gas estate. On the contrary, they have permitted the taxes on the entire Warrant to be assessed to and paid by others. Having failed to comply with this statute, if the plaintiffs actually believed they had an estate in the Warrant, they cannot now set up as an excuse that there was no known evidence of the existence of such mineral estate, and that it was therefore not subject to taxation. Under this statute the holder of the unseated land or of a mineral estate thereunder is required to notify the taxing authorities of such a holding, and the Commissioners, not the landowner, determine what is to be its assessable value (*Hutchinson vs. Kline*, 199 Pa. 504).

In *Patton vs. Commonwealth Trust Company*, 276 Pa. 95, opinion at page 99 it is said:

"Laches is not excused by simply saying: 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. The test is not what the plaintiff knows, but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him." See Scranton Gas & Water Co. vs. Lackawanna Iron & Coal Co., 167 Pa. 136. In 21 C. J., p. 402, the rule is thus stated: "Where ignorance of rights or wrongs is relied on to account for laches, this fact must be plainly alleged in the bill. A general averment of plaintiff's ignorance of his rights is insufficient; he must allege why he was so long in ignorance and the means used to keep him so, that the facts could not have been discovered by the exercise of due diligence, and must acquit himself of all knowledge of facts which would put him on inquiry."

The Elk County assessment has been of the entire interest in the Warrant, in the names of Elk Tanning Company, Central Pennsylvania Lumber Company, Andrew Jackson Eisenhuth, and The Sagamore Big Game Club, for the years 1895 to 1954 inclusive.

Without having recognized for more than half a century any obligation of ownership or asserted any claim against the record title holders who held in open and notorious possession, the plaintiffs now seek to enrich themselves at the expense of the defendants, respondents here, whose initiative, energy and capital have developed and given value to the gas rights in the Warrant. The equities in the case are all in favor of the defendants.

Supreme Court on Certiorari will not review fact questions found in Respondents' favor by both Courts below.

The relevant and material facts are undisputed. There is no issue for a jury. Both Courts below so found. Mr. Chief Justice Hughes stated the applicable rule substantially as follows:

> Where on questions of fact both Courts decided against the petitioners, this Court under the well established rule accepts the findings in which two Courts concur, unless clear error is shown.
>
> *Texas & New Orleans Railroad Co. vs. Brotherhood of Railway & Steamship Clerks et al*, 281 U.S. 548;
>
> *Paine vs. Arkansas Nat. Gas Corp.*, 286 U.S. 418;
>
> *Just vs. Chambers*, 312 U.S. 383.

In the order stated in the Petition, we answer each of the several "questions presented" therein.

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(1) The finding of the District Court and of the Circuit Court of Appeals that there was no payment of the taxes of 1892 and no redemption of the land after the tax sale of 1894 are attacked by Petitioners who allege that they offered evidence which, if believed by a jury, would sustain the contrary.

The admissions of counsel for Petitioners above reproduced completely refute such allegation. There was no offer of evidence of such nature.

Petitioners contended that Proctor made an agreement with Elk Tanning Company to convey Warrant 5343 in question along with other lands, upon an exception and reservation of the minerals, gas and oil, free and clear of debts through the year 1892.

There was no offer to prove such agreement; on the contrary, that contention proved to be baseless on the admission of counsel. It was so found by both the District Court and the Circuit Court of Appeals.

At the sale of the Warrant for the unpaid taxes of 1892, C. W. Childs was the purchaser, and Petitioners allege that Childs was then acting on behalf of Elk Tanning Company. There is no relevant proof in this case to sustain the assertion that Childs was acting for anyone other than himself at said tax sale.

The affidavit of John G. Flemming submitted to the District Court by Petitioners, is of no value to the cause

of Petitioners, since it does not show affiant to be competent to testify to the matters stated therein as required in Rule 56(e), and otherwise does not comply with said Rule. Although it contained statements of account with Proctor's estate of the financing of the taxes and other charges pertaining to certain lands situate in Clearfield County, Lycoming County and Sullivan County, there is no mention made in said financial statement of any taxes or charges on any lands in Elk County where Warrant 5343 is situate. The alleged agreement between Proctor and Elk Tanning Company is not confirmed by Affiant Fleinning, who, on the contrary, only says that a Boston trust company has in its custody a "form of agreement which plaintiffs *claim* was made" on or about May 1, 1893, between Proctor and Elk Tanning Company for conveyance of said Warrant 5343, excepting minerals, oil and gas, whereas, the deed record shows that on May 1, 1893, Proctor did not then own said Warrant and did not acquire same until by deed dated June 5, 1893.

These allegations amount to no more than wishful thinking.

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(2) Neither the District Court nor the Court of Appeals erred in holding that on October 1, 1894, Proctor had no title to convey so as to except or reserve the right to the gas.

It is the recognized doctrine that a plaintiff in ejectment must recover *solely* on the strength of his own title.

Proctor had lost all his title to Warrant 5343 by the tax sale. He had no title in said Warrant on October 1,

1894, either to convey or reserve. His attempt at reservation was a futile thing and a nullity. By his deed to Elk Tanning Company he could not breathe life into or give vitality to a reservation which was void, or confer upon it a legality or an existence which it did not have when such attempt was made. All he could convey by that deed was the right of redemption.

If the attempted reservation of the natural gas by Proctor were to be given the effect contended for by the Petitioners, the result would be to preserve ownership of that which was sold at the Treasurer's sale.

If it is assumed, for sake of argument only, that Proctor had a right to the gas when he made the attempted reservation in the deed of October 1, 1894, it is admitted that there was no redemption from the tax sale. Redemption was necessary to fully restore such alleged right. For the reasons stated, that deed has no evidentiary value and could not estop the defendants. Nothing was done after the tax-sale to establish any valid title of record in Proctor, either by redemption or on any other theory.

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(3) The doctrine that parties and privies to a deed are bound by recitals in such deed, has no application to the case at bar.

The Petitioners contend that because the defendants in their abstract of title recited the deed from Thomas E. Proctor and wife to Elk Tanning Company, they are stopped by such fact from denying the title which Petitioners claim to the natural gas under the reservation attempted by Proctor.

The deed from Thomas E. Proctor to Elk Tanning Company was included in defendants' abstract for the purpose of showing that there were eighteen separate parcels of land conveyed by that deed. Such exception or reservation was placed in that deed following the description of all of the 18 parcels and was not applicable *alone* to Warrant 5343 as inferred from the Complaint of the plaintiffs filed in the District Court and which the defendants then believed was the inference intended. The Complaint made no reference to the tax sale of June 11, 1894.

The defendants' claim of title is under the tax deed from the County Treasurer to George W. Childs, dated June 11, 1894. The deed under which the Petitioners claim the estoppel arises is the deed from Thomas E. Proctor to Elk Tanning Company dated October 1, 1894. It is apparent that the title under which the defendants claim is not by deed from Proctor but is from George W. Childs, a stranger to the record, which is the anterior title to that purported to have been conveyed to Elk Tanning Company, and is the deed which is paramount in its inception.

The rule that recitals in deeds may bind the parties and those in privity is subject to the exception that such recitals are not evidence against a stranger or other person claiming under a title derived from the grantor before the deed was made containing such recital.

The exception is well stated in *Carver vs. Jackson*, 29 U.S. 1, 7 L. Ed. 761, 790, as follows:

> "But it does not bind mere strangers or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title or persons claim-

ing from the parties by title anterior to the date of the reciting deed."

and the rule in Pennsylvania is the same as stated in *Daugherty vs. W[illegible]ana*, 233 Pa. 124, Op. 133.

The deeds in the abstract of title are all a part of the records of Elk County with reference to the title to Warrant 5343 and are part of the history of that title. In the deed subsequently made by Elk Tanning Company for said 18 parcels of land, including Warrant 5343, the interest intended to be conveyed by the deed is expressed to be "the right, title, interest and estate, but *no greater than* is now held by the Elk Tanning Company, of, in and to the lands hereinbefore mentioned". See photo copy of this deed, Appendix to Brief for Defendants, Circuit Court, following 26b.

Obviously, these deeds did not create recitals binding on the defendants and consequently did not estop the defendants.

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(4) The District Court and the Court of Appeals correctly held that the Memoranda of the Prothonotary of Elk County were part of the Record of the Acknowledgment by the Treasurer of his Deed.

The acknowledgment by the County Treasurer of his deeds is prescribed by the Pennsylvania Statute of April 1804, 4 Sm. L. 201, as follows:

"All unseated lands . . . shall . . . be valued and assessed . . . but collection of taxes on unseated lands shall not be enforced . . . until the county commis-

sioners shall issue their warrant . . . directed to the Sheriff . . . (later changed to County Treasurer) commanding him . . . to make public sale . . . of unseated lands . . . and to make and execute . . . deeds in fee simple to the . . . purchasers . . . *and the same in open court of Common Pleas of the proper county duly to acknowledge* . . . ." (Emphasis supplied.)

It will be noted there is no statutory provision as to the manner or method of how the acknowledgment of deeds by the County Treasurer in open court is to be entered among the records kept of the proceedings.

The weight of Pennsylvania decisions is to the effect that the records kept by the Prothonotary of this proceeding, even though in more than one book related to the same subject matter, are deemed to be in pari materia and constitute the record and to thus conform to the statutory requirement. *Central Pennsylvania Lumber Co. vs. Bretol*, 250 Pa. 61.

Each of the Courts below found the acknowledgment by the County Treasurer of his deed to George W. Child to be proper.

(5) Petitioners' Constitutional rights to due process have not been violated.

Petitioners complain of the ruling by the Court of Appeals that the Pennsylvania Act of May 5, 1941, P.L. 38, Sec. 1, 21 P.S. 283 (which was enacted to validate treasurer's sales and treasurer's deeds when the records the actual acknowledgment of tax deeds by County Treas-

any) was irregular or defective), was applicable to the Treasurer's deed in this case because they say this legislation gives no right of redemption after such sales were thus validated.

This attack on the statute in question is baseless. The contention that this statute denies or takes away the right of redemption is erroneous. It simply validates the sale and makes no change in the existing right of redemption.

To contend that this statute is unconstitutional on the ground that it denies the existing right of redemption is untenable. There is no change made by it in the settled usages and modes of procedure prescribed by law for redemption.

Moreover, the decision of the Circuit Court, 265 F. (2d) 196, Opinion 200, shows that the Circuit Court followed exactly the conclusion of Judge Wilson in the District Court in holding that "The contention that the tax deed was invalid because it was not acknowledged in open Court, is untenable."

CONCLUSION

For the foregoing reasons, the Respondents pray that the Writ of Certiorari be denied.

Respectfully submitted,

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